No. 15167

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL NO. 1400, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO; LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO; LOCAL NO. 1046, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO; AND SAN BERNARDINO AND RIVERSIDE COUNTIES DISTRICT COUNCIL OF CARPENTERS, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondents on January 20, 1956 (R. 297–317)[1] and reported at 115 N. L. R. B. 126. This Court has jurisdiction under Section 10 (e) of

[1] References to portions of the printed record are designated "R". Where, in a series of references, a semicolon appears, references preceding the semicolon are to the Board's findings and later references are to the supporting evidence.

the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*),[2] the unfair labor practices having occurred in and around Los Angeles and Palm Springs, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that the several respondent labor organizations violated Section 8 (b) (1) (A) and (2) of the Act by requiring nonmembers to pay fees for permits and working cards, which fees were not required of members. The Board further found that these unfair labor practices affected "commerce" within the meaning of the Act because they were committed under color of respondents' contracts with Building Contractors Association of California (hereinafter called BCA) and Associated General Contractors, Southern California Chapter (hereinafter called AGC), the members of both of which are engaged in construction activities affecting interstate commerce. The evidence in support of these findings may be summarized as follows:

A. The activities of BCA and AGC

AGC and BCA are trade associations admitting to membership firms engaged in construction work in Southern California (R. 57, 59; 496–498, 541–543).[3]

[2] The relevant statutory provisions are reprinted *infra*, pp. 29–32.

[3] General Counsel's Exhibit 17 and 23 (R. 532, 844), not reproduced in full in the printed record, show that BCA embraces approximately 500 construction contractors and AGC has over 300 members.

The record discloses that among the construction work performed by AGC members were a 12 million dollar project constructed between April 15, 1952, and March 31, 1954, for the United States Marine Corps at Twentynine Palms, California, and a 10 million dollar project constructed between June 1, 1953, and September 29, 1954, for the United States Army at Las Vegas, Nevada (R. 60–61; 458–474, 494–495, 509–520, 516–518, 844–845). The record further discloses that among the construction work performed by BCA members in 1953 was $700,000 worth of work on facilities of the B. F. Goodrich Company, a firm admittedly engaged in interstate commerce (R. 57–58, 67; 532, 638–642, 649). Among the members of BCA is Pardee Construction Company, a partnership comprised of three brothers who, through this Company and through other companies in which the brothers individually are sole or controlling stockholders, are engaged in extensive construction work in California and Nevada (R. 51–57, 63–64; 348–366, 372–378, 443–452).[4]

AGC and BCA regularly execute identical contracts known as "Master Labor Agreements" with a group of labor organizations, including representatives of respondents, governing labor relations in the construc-

[4] The various Pardee enterprises are all operated out of the main office of Pardee Construction Company in Santa Monica, California, where some employees "are employed by the specific entity for whom they are working" while other employees such as "office managers and head accountants and so forth" render service to all the Pardee enterprises (R. 57; 360–361). Between 1952 and 1954, over 40 percent of the $6½ million income of the Pardee enterprises was derived from construction services in Nevada (R. 56–63; 443–451).

tion industry in Southern California (R. 85–89; 456, 475–481, 496–500, 522–523, 536–546). All members of AGC and BCA were considered signatory to these contracts, the terms of which are discussed in the following paragraph, and the construction projects referred to above were performed under those contracts (R. 94–95, 113; 513, 530–537, 763–766, 821–822, 840–841). Construction contractors who are not members of either AGC or BCA are normally required by the unions to agree to abide by the master agreement (R. 713–714, 758–759).

B. The unfair labor practices

1. The terms of the contract

The Master Labor Agreements provide in Article II-A that the employers recognize the unions as bargaining representative of the employees over whom the unions have jurisdiction and further provide that employees must become union members not more than thirty days after being employed. (R. 88–89; 498–500, 543–544). The contract then provides for a dispatch system in the following terms (R. 89–90; 500–501, 545–546):

> B. That in the employment of workmen for all work covered by this Agreement in the territory above described, the following provisions, subject to the conditions of Article II-A, above, shall govern:
>
> 1. That the Local UNIONS shall establish and maintain open and nondiscriminatory employment lists for employment of workmen in the work and area jurisdiction of each respective Local UNION of each particular trade.

That the CONTRACTORS shall first call upon the respective Local UNIONS having work and area jurisdiction, or their Agents, for such men as they may from time to time need, and the respective Local UNIONS, or their Agents, shall immediately furnish to the CONTRACTORS the required number of qualified and competent workmen and skilled mechanics of the classifications needed by the CONTRACTORS.

That the respective Local UNIONS, or their Agents, will furnish each such required competent workman or skilled mechanic entered on their lists, to the CONTRACTORS by use of a written referral and will furnish such workmen or skilled mechanics from the respective Local UNIONS listings in the following manner:

(a) Workmen who have been recently laid off or terminated in that respective Local UNION's work and area jurisdiction by the CONTRACTORS now desiring to re-employ the same workmen in that same area provided they are available for employment.

(b) Workmen who have been employed by CONTRACTORS in the respective Local UNION'S work and area jurisdiction within the multiple-employer unit during the previous ten (10) years, and are available for employment.

(c) Workmen whose names are entered on the list of the respective Local UNION having work and area jurisdiction and who are available for employment.[5]

[5] Article II–B further provides that if the Local Unions do not, within 48 hours after appropriate notice from the Contractors, furnish the required workmen, the Contractors are entitled to obtain such workmen from other sources but are to report the names of such workmen to the Local Union having work and area jurisdiction (R. 91; 501, 546).

2. Respondents' discrimination against nonmembers

Both Local 1400 and Local 1046 maintain "out-of-work" registers pursuant to the union-security provisions of the Master Labor Agreements described above (R. 298, 302, 131, 139, 160, 170; 672, 673, 705, 752). The practice of the two Locals with respect to these registers is substantially the same. Thus, local members and members of locals affiliated with the respective district councils sign the register so long as they are current in their dues payments (R. 131, 152, 172; 705–707, 831–832). However, in the case of Local 1400's list, members of locals outside the jurisdiction of the Los Angeles District Council "had to be cleared through the Local or through the Council before they could sign the list" (R. 149–150, 152; 702, 704, 707, 809). As explained by representatives of respondent Los Angeles District Council, and of respondent 1400, "clearing through the Council" means obtaining a temporary work card, good for 30 days, from the Council (R. 152; 701–704, 707–708, 710, 809). They further explained that the foreign members' fees for these temporary work cards are the equivalent of one month's local dues, and that the Council retains these monies "for bookkeeping purposes," although regular local dues are apportioned among the local, the District Council, and the International (R. 127; 710–712).[6]

Similarly, members of foreign locals not wishing to transfer their membership into Local 1046 must ob-

[6] Foreign members who indicate a desire to join Local 1400 also have to obtain temporary work cards. These, however, are issued by the Local, without cost to the applicant (R. 149–150; 707–710, 812).

tain District Council temporary work cards before signing the Local 1046 list, while members of "any of the 11 locals" comprising the San Bernardino and Riverside District Council can sign the list without such a card (R. 301–302, 172; 831–832). The charge for a temporary work card is the equivalent of one month's local dues (R. 140; 832).[7]

3. The discrimination against Dowdall and Dockery

The experience of Clarence Dowdall and J. H. Dockery illustrates how this system operates. Both men were experienced carpenters, and long-time members of various Carpenters' locals (R. 117; 378–379, 555–556, 599). Early in 1953, each of them independ-

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[7] The "By-Laws and Trade Rules" of the San Bernardino and Riverside District Council provide, *inter alia* (R. 777–778):

ARTICLE I

"Section 1. Members coming into the District Council's jurisdiction shall obtain a San Bernardino and Riverside Counties' District Council working card or permit before seeking employment. Failure to comply with this section will be fined not less than twenty-five dollars ($25).

* * * * *

ARTICLE II

"Section 3. All members in the jurisdiction of this Council shall be given the opportunity of being employed before calling outside Locals for men. No Local in this District Council shall require a transfer of membership or charge a permit fee of a member of another Local affiliated with this District Council * * *

"Section 4. Any member from another Local outside of this District Council taking out a temporary working card prior to the 25th of the month, must pay for the current month. Monthly working cards shall be the same as our dues * * *"

(Section 4, quoted here, was inadvertently omitted from the printed record before this Court.)

ently moved to Alaska, transferring his union membership to Local 1281, in Anchorage—Dockery from Local 1400 in Los Angeles, and Dowdall from Local 1046 in Palm Springs (R. 118; 415, 442, 556). Thereafter, in the fall of 1953, both returned to the Los Angeles area (R. 119; 439, 624–625). On December 2, 1953, Dowdall and Dockery sought work at Pardee's Pacific Palisades project (R. 120–122; 379–383, 557–558). There, Superintendent Lancaster informed them that he had two openings for carpenters, and instructed them to clear first through Local 1400 (R. 122–124; 384, 559–560). On the following morning, December 3, 1953, Dowdall and Dockery reported to Local 1400's office and requested referrals to the Pardee project (R. 124; 385, 426, 563–564, 793–794). Savage, the Local's dispatcher, informed the two applicants that since they were members of the Alaska Local they would have to procure temporary work cards from the District Council (R. 125; 389, 427, 571, 794–795). Dowdall and Dockery then proceeded to the District Council and obtained the required temporary work cards for which they paid $3.00—the equivalent of the monthly dues then in effect in the Carpenters' Locals affiliated with the District Council—although they were current in their dues to the Alaska Local (R. 127; 390–393, 412, 415, 566, 573–575, 577–579, 598). They then returned to Local 1400's hall where Savage and Business Representative O'Hare informed them that the Local could not refer them to the Pardee job. O'Hare explained that under the Master Labor Agreement employers were pledged to hire only through union halls (R. 129; 395, 581–582, 680–684, 797–799,

800).[8] When Dowdall and Dockery asked what they had to do to secure employment, O'Hare told them to sign the Local's "out-of-work" list, which they did (R. 130–131; 396, 582–584, 680–684, 685, 700–701, 799). Thereafter, on January 4, 1954, and February 13, 1954, Dockery obtained additional temporary work cards from the District Council, paying $4.00 for each card (R. 136; 406–412).

Dowdall, however, transferred his job-seeking activities to the Palm Springs, California, area. Early in January, his quest for work having proved fruitless, Dowdall reported to the Indio local office of the California State Employment Service to file a claim for unemployment insurance (R. 138, 302; 585–586). There he was advised that as a union member he would have to register for work with a Carpenters' local and obtain evidence of such registration from the local's business agent before he could file his claim (R. 138, 302–303; 586). Accordingly, Dowdall attempted to register with Local 1046, to which he had once belonged (R. 139, 302–303; 586–587). However, Business Agent Adams at first refused to permit Dowdall to sign the "out-of-work" list because he was not a member of Local 1046, despite Dowdall's explanation that his sole purpose was to qualify for unemployment insurance. Adams finally relented and permitted Dowdall to sign the list only when he agreed to pay a $5.00 fee for a temporary work card (R.

[8] O'Hare also warned Dowdall and Dockery that under the Union's by-laws they were subject to a fine for attempting to procure their own jobs without first "clearing" into a Los Angeles local or securing a temporary work card from the District Council (R. 130; 397, 440–441, 582, 683, 700).

139–140, 303; 589–590, 598, 723, 827–831).[9] Adams, however, told Dowdall:

> You understand that you are not going to work on this permit here in Riverside County at all because I'm not honoring no permits. You have to clear into this local before you can go to work (R. 139–140; 589).

Thereafter Dowdall, on his own, secured employment at Desert Hot Springs, California (R. 141–142; 591–592). Finally, on May 3, 1954, Dowdall, to "keep straight" with the Union, obtained another District Council "Temporary Working Card" for which he again paid $5.00 (R. 142–143; 595–597, 598, 732, 833–834).

II. The Board's conclusions of law

Upon the foregoing facts the Board concluded that the practices here involved affect commerce within the meaning of the Act (R. 62–72, 298). The Board further concluded that, in view of their exclusive referral rights under the contracts, respondents Local 1400 and Los Angeles District Council violated Sections 8 (b) (2) and (1) (A) of the Act by requiring Dowdall and Dockery to obtain temporary working cards for a fee from the District Council in order to qualify for registration on the Local's "Out-of-Work" list and for referral to a job (R. 298–299). Pointing out that members of Local 1400 and other locals affiliated with the District Council were not required

[9] The card, a District Council "Temporary Working Card," is dated January 7, 1954, and signed by Adams, who was President of the District Council as well as Business Agent of Local 1046 (R. 140; 598, 653).

to pay similar fees for the use of the Local's registration and referral facilities, the Board held that "[t]his disparate treatment which Dowdall and Dockery could have avoided only by transferring their membership into Local 1400, is a form of discrimination in employment that necessarily encourages membership in a labor organization within the meaning of Section 8 (a) (3) of the Act" (R. 299).[10]

The Board further found that respondents Local 1046 and San Bernadino and Riverside District Council similarly violated Section 8 (b) (2) and (1) (A) of the Act "by not making Local 1046's registration and referral facilities available to members and nonmembers on the same terms and conditions" (R. 301–302). Finally, the Board, one member dissenting, held that respondents Local 1046 and its District Council additionally violated Section 8 (b) (1) (A) of the Act by "requiring Dowdall to procure a temporary working card for a fee as a condition for registering on the 'Out-of-Work' list" (R. 302, 311–313). The Board majority noted that by this act "Local 1046 coerced Dowdall, under pain of forfeiting his right to unemployment compensation, into contributing financial support to Local 1046 in the form of a fee for a working card" and that such "economic coercion of financial contributions" invades the employee's right to refrain from assistance to the Union and hence violates the Act (R. 303). More-

[10] The Board, reversing the Trial Examiner, dismissed allegations in the complaint that these respondents violated the Act by failing properly to advise Dowdall and Dockery as to the reporting and registration procedures and refusing to honor Pardee's request for the two men (R. 299–301).

over, held the Board, such conduct coerced Dowdall "in the exercise of his right not to join Local 1046," further impinging on his rights under Section 7 of the Act (R. 304).

III. The Board's order

The Board ordered respondents to cease and desist from the unfair labor practices found and from any like or related violations of the Act (R. 306–311). Affirmatively, the Board ordered respondents to refund to Dowdall and Dockery the fees they were required to pay for their temporary working cards and to post appropriate notices. The respondent District Councils were further ordered to publish the notices in newspapers of general circulation in the counties involved (R. 305–311).

ARGUMENT

I

The unfair labor practices affect commerce within the meaning of the Act

The practices involved in this case occurred pursuant to the Master Labor Agreement, which governs labor relations in the construction industry in Southern California. That this industry affects interstate commerce is well settled. See, e. g., *N. L. R. B.* v. *Reed,* 206 F. 2d 184, 186 (C. A. 9); *Shore* v. *Building & Construction Trades Council,* 173 F. 2d 678, 681 (C. A. 3); *Joliet Contractors Assn.* v. *N. L. R. B.,* 193 F. 2d 833, 838–844 (C. A. 7); *Douglas* v. *I. B. E. W.,* 136 F. Supp. 68, 72–73 (W. D. Mich.); *United Assn. of Journeymen* v. *Marchese,* 302 P. 2d 930, 933, —— Ariz. ——.

In asserting jurisdiction in this case the Board could properly note that AGC and BCA are trade associations bargaining on behalf of their employer members for a single contract, and accordingly the Board could appropriately consider the effect of their combined businesses on interstate commerce. See *Leonard* v. *N. L. R. B.*, 197 F. 2d 435, 436, n. 1 (C. A. 9); *Katz* v. *N. L. R. B.*, 196 F. 2d 411, 413 (C. A. 9); *Marchese, supra.* Moreover, the record shows that several of the contractors party to this Master Agreement engaged in multi-million dollar construction projects affecting commerce.[11]

Nor can there be any doubt that, as found by the Board, respondent unions were parties to identical collective bargaining agreements with AGC and BCA. Union officials O'Hare, Savage, Adams, and Jensen, as well as BCA Executive Vice President Sills and AGC Labor Relations Director Boyce, all testified that the contracts printed and distributed by AGC and

[11] The Board's findings as to the interstate business activities of the various AGC and BCA member firms are based on the credited and uncontradicted testimony of officials and employees of these firms. In addition, the finding as to Pardee is based on the testimony of the Company's attorney and its chief accountant. This evidence "could properly be considered by the Board in determining whether this was such a case as would warrant its taking jurisdiction, and in no sense could it, in this respect, be bound by the hearsay evidence rule." *N. L. R. B.* v. *Cantrall Co.*, 201 F. 2d 853, 855 (C. A. 9), certiorari denied, 345 U. S. 996; cf. *N. L. R. B.* v. *Haddock Engineers, Ltd.*, 215 F. 2d 734 (C. A. 9). Furthermore, the record warrants the Board's finding that Pardee formed part of a "'web' of business activities, currently dominated and controlled by the three Pardee partners" (R. 53). Accordingly, the Pardee companies are an "integrated enterprise" constituting a single "employer" within the meaning of the Act. See *Andrews Co.* v. *N. L. R. B.*, 236 F. 2d 44 (C. A. 9).

BCA were the collective bargaining agreements in effect during the winter and spring of 1953–1954, the period during which respondents committed the unfair labor practices here involved. In these circumstances, the Board properly affirmed the Trial Examiner's conclusion that (R. 116–117):

> The contractors and the unions "signatory" to each of the Master Labor Agreements now under consideration certainly conducted themselves, at all material times, as if they were privy to a contractual relationship. In the light of such conduct on their part, a conclusion that they were, then, contractually bound * * * would certainly seem to be warranted.

Where, as here, employers bargain as a group with the representatives of their respective employees, any labor dispute that might arise, whether the result of the employers' or unions' unfair labor practices, would have the inevitable tendency to disrupt the operations of all the participating employers and bring about a serious interruption to the free flow of interstate commerce. Accordingly, the Board's exercise of jurisdiction over the unions herein, who are the collective bargaining representatives of employees of the employer members of AGC and BCA, was clearly warranted on the basis of the "totality" of operations of all the employer-members of each association. See *Joliet Contractors Assn.* v. *N. L. R. B.*, 193 F. 2d 833, 840 (C. A. 7), and the *Marchese* and other cases cited *supra*, p. 12.

II

The Board properly held that respondents violated Section 8 (b) (1) (A) and (2) of the Act

A. Introduction: Substantial evidence supports the Board's findings

The instant case raises no material issues of fact. As we have shown above, pp. 3–5, respondent unions have identical collective bargaining agreements with AGC and BCA granting respondents the exclusive right to refer applicants for employment to the associations' members on a nondiscriminatory basis. The testimony of union officials O'Hare and Savage, along with that of the complainants, Dowdall and Dockery, establishes that respondents Local 1400 and Los Angeles District Council required Dowdall and Dockery to obtain a temporary working card for a fee from the District Council in order to qualify for registration on Local 1400's "Out-of-Work" list and for referral to a job, while not requiring members of Local 1400 and other locals affiliated with the District Council to pay a similar fee (R. 389–397, 427, 570–582, 680–685, 701–712, 785–795).

Similarly, the testimony of union officials Adams and Jensen accords with the "By-Laws and Trade Rules" of the San Bernardino and Riverside District Council, and establishes that job applicants who were not members of Local 1046 or other local unions affiliated with the San Bernardino and Riverside District Council could not register for employment on Local 1046's "Out-of-Work" list unless they paid a fee for

a temporary working card which members of these organizations were not required to pay (R. 771–772, 777–778, 831). Moreover, Business Agent Adams told Dowdall that he could not work in the area without transferring his membership into Local 1046. Adams admitted that he would not accept Dowdall's registration because he was not a member of Local 1046, despite Dowdall's assurance that his sole purpose for registering was to qualify for unemployment compensation, and not to seek work through the Union. Adams also testified that he relented only when Dowdall agreed to pay a $5.00 fee for a temporary working card (R. 828–830, 836).

In these circumstances, the issues before this Court raise primarily questions of law: namely, (1) whether respondents Local 1400 and Los Angeles District Council violated Section 8 (b) (2) and (1) (A) of the Act by requiring Dowdall and Dockery to obtain temporary working cards for a fee in order to qualify for registration on the "Out-of-Work" list and referral to jobs; (2) whether respondents Local 1046 and San Bernardino and Riverside District Council violated Section 8 (b) (2) and (1) (A) of the Act by not making Local 1046's registration and referral facilities available to members and nonmembers on the same terms and conditions; and (3) whether respondents Local 1046 and its parent District Council independently violated Section 8 (b) (1) (A) of the Act by requiring Dowdall to procure a District Council temporary working card for a fee in order to register on the "Out-of-Work" list for purposes of qualifying for State unemployment compensation.

As we show below, the Board properly decided these questions in the affirmative.

B. By requiring Dowdall and Dockery to obtain temporary working permits for a fee, Local 1400 and the Los Angeles District Council violated Section 8 (b) (2) and (1) (A) of the Act

Settled law establishes that, subject to one sharply defined exception,[12] the rights of an employee or an applicant for employment may not be abridged or terminated because of his membership or nonmembership in a labor organization.[13] Thus an employer violates Section 8 (a) (3) and (1) of the Act if he requires membership in a labor organization as a condition precedent to employment (see, e. g., *N. L. R. B.* v. *Swinerton & Walberg Co.*, 202 F. 2d 511, 514 (C. A. 9), certiorari denied, 346 U. S. 814; *N. L. R. B.* v. *Cantrall*, 201 F. 2d 853, 855–856 (C. A. 9), certiorari denied, 345 U. S. 996; *N. L. R. B.* v. *George D. Auchter Co.*, 209 F. 2d 273 (C. A. 5)), while a union violates Section 8 (b) (2) and (1) (A) of the Act if, either by agreement or by practice, it causes an employer to engage in such discrimination. See *N. L. R. B.* v.

[12] The proviso to Section 8 (a) (3) of the Act.

[13] Before the Board, respondents contended that Section 8 (b) (2) of the Act, which prohibits unions from causing or attempting to cause employers from discriminating against *employees* in violation of Section 8 (a) (3) of the Act, relates only to employees and not to applicants for employment. This issue has long since been settled by the holding in *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 183–187, that the Act prohibited employer discrimination against applicants for employment, as well as against those already employed. Moreover, this Court has consistently enforced Board orders remedying union discriminations against applicants for employment. See, *e. g.*, *N. L. R. B.* v. *Local 743*, 202 F. 2d 516; *N. L. R. B.* v. *Charles E. Daboll*, 216 F. 2d 143, certiorari denied, 348 U. S. 917.

International Union of Operating Engineers, Local 12, 237 F. 2d 670, 674 (C. A. 9), and cases there cited. Furthermore, "[a]n attempt to cause an employer to discriminate against an employee in violation of Section 8 (a) (3) constitutes a violation of Section 8 (b) (2) even though the employer did not as a matter of fact discriminate." *Local 12, supra,* 237 F. 2d at 673.

Applying these settled principles to the facts of the instant case, Local 1400's and the Los Angeles District Council's discrimination against Dowdall and Dockery is manifest. Other employees, members of Local 1400, were referred to jobs without being required to pay a permit fee. By requiring Dowdall and Dockery to procure temporary working permits for a fee[14] before they could even be considered for referral to jobs through Local 1400's hiring hall, respondents effectively removed Dowdall and Dockery from the list of potential employees because of their nonmembership in an affiliate of the Los Angeles District Council. In thus requiring a fee only of nonmembers, respondents coerced them into assisting a labor organization in derogation of their Section 7 right to refrain from such assistance, thereby violating Section 8 (b) (1) (A). Moreover, since nonmembers were required to pay a special fee

[14] O'Hare, an official of Local 1400, testified that the District Council kept the permit fees for "bookkeeping" purposes and that Local 1400 received no benefit from such fees (*supra*, p. 6). It is thus apparent that the permit fees cannot be considered as a "reasonable charge" for operating the Local's dispatch system. *N. L. R. B.* v. *International Union of Operating Engineers, Local 12*, 237 F. 2d 670, 674 (C. A. 9).

to get a job, the requirement encouraged membership in a labor organization, and resulted in discriminatory conditions of employment violative of Section 8 (a) (3) and 8 (b) (2). *Local 12, supra,* 237 F. 2d at 673; *N. L. R. B.* v. *I. L. W. U.,* 210 F. 2d 581, 583 (C. A. 9); *N. L R B* v *Local 743,* 202 F 2d 516 (C. A. 9).[15]

C. The policy of Local 1046 and the San Bernardino and Riverside District Council of not making the Local's registration and referral facilities equally available to members and nonmembers violated Section 8 (b) (2) and (1) (A) of the Act

What we have said above with respect to Local 1400 and the Los Angeles District Council is equally applicable to Local 1046 and the San Bernardino and Riverside District Council. These respondents likewise denied nonmembers access to the hiring hall unless they first obtained temporary work permits

[15] At the hearing before the Trial Examiner respondents apparently sought to attack the good faith of Dowdall and Dockery by adducing testimony tending to show that they were familiar with the permit-fee requirements prior to their visits to the unions' halls (R. 150–151; 417, 418–419, 618–624). In *N. L. R. B.* v. *Swinerton and Walberg Co.*, 202 F. 2d 511, 515 (C. A. 9), certiorari denied, 346 U. S. 814, this Court rejected a similar contention, holding that "knowledge of a hiring policy which is discriminatory and illegal does not characterize an application for work as being made in bad faith where all the evidence indicates that the men would have accepted work if it had been tendered." Since the instant record firmly establishes not only that Dowdall and Dockery "would have" accepted employment, but, indeed, subsequently did accept jobs in their trade (R. 419–420, 591–592), it is clear that their good faith is not open to challenge. Moreover, the only relief which the Board's order affords Dowdall and Dockery is the recovery of the permit fees which they actually paid; the balance of the order is concerned with the respondents' unlawful hiring policy, the illegality of which is not affected by the good or bad faith of Dockery and Dowdall.

for a fee.[16] That Local 1046 and its parent council followed this policy is evidenced not only by Dowdall's experience (*supra,* pp. 9–10), but also by the testimony of Adams and Jensen, officers of these respondents (R. 771, 831–832, 837–838), and by the "By-Laws and Trade Rules" of the District Council (*supra,* p. 7, n. 7). Accordingly, for the reasons outlined in Point B above with respect to Local 1400 and Los Angeles, the Board properly found that the other respondents likewise violated Section 8 (b) (2) and (1) (A) of the Act.[17]

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[16] Unlike *N. L. R. B.* v. *International Union of Operating Engineers, Local 12*, 237 F. 2d 670 (C. A. 9), the record here establishes that Local 1046 required the permit fees from foreign members, and it seems clear that such fees "were not a reasonable charge for operating the dispatch system." *Local 12, supra,* at p. 674. The fees are assessed pursuant to the District Council "By-Laws and Trade Rules" for District Council "Temporary Working Cards," and appear to have no relation to the operation of the Local's hiring hall. The fee for a 30-day permit was equivalent to one month's dues. Since the dues of union members were used not only for the expenses of the hiring lists but for all the other expenses of the union, it is evident that in charging the equivalent of a month's dues for a monthly permit the union would be charging foreign members more for the hiring hall than it charged its own members. Furthermore, in view of O'Hare's testimony that Local 1400 did not receive any of the permit fees paid to the Los Angeles District Council, it is unlikely that the practice in the Palm Springs area differed from that of Los Angeles, and it is a reasonable assumption that Adams signed the "Temporary Working Card" issued to Dowdall as a District Council representative rather than in his capacity as an officer of Local 1046.

[17] Although the original complaint (R. 3–8) alleged this conduct to be violative only of Section 8 (b) (1) (A), during the course of the hearing the General Counsel amended the complaint to include an 8 (b) (2) allegation as well (R. 36–39). The Board sustained the Trial Examiner's conclusion that the conduct violated both Section 8 (b) (2) and (1) (A) of the Act, rejecting

D. By causing Dowdall, under pain of forfeiting his unemployment insurance, to pay a fee for a work permit, Local 1046 and the San Bernardino and Riverside District Council coerced him into contributing financial assistance to the Unions and penalized him because of his nonmembership, thereby violating Section 8 (b) (1) (A) of the Act.

When Clarence Dowdall sought unemployment compensation through the appropriate agency of the State of California, he was advised that he could not recover such compensation unless he was registered with a Carpenters' local as available for work. Accordingly, Dowdall sought to register with Local 1046, explaining to officials of that union and of its parent District Council that he would seek employment on his own, and desired to register only for the purpose of qualifying for unemployment compensation while he conducted his search for work. The union permitted him to register only after he paid a fee for a temporary working card, a fee not required of union members. The majority of the Board held that by exacting this fee the Union violated Section 8 (b) (1) (A) of the Act. We show below that this holding is correct.

Section 8 (b) (1) (A) provides that unions shall not restrain or coerce employees in the exercise of

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respondents' contention that Section 10 (b) barred the amendment to the complaint (R. 301). In view of the fact that both allegations are based on the identical conduct, it is too well settled to warrant extensive argument that the limitations proviso of Section 10 (b) did not preclude either the amendment to the complaint, or a Board finding based thereon. See *N. L. R. B.* v. *Osbrink*, 218 F. 2d 341 (C. A. 9) certiorari denied, 349 U. S. 928. See also *A. N. P. A.* v. *N. L. R B.*, 193 F. 2d 782, 799–800 (C. A. 7), certiorari denied on this question, *I. T. U* v *N. L. R B.*, 344 U. S. 816; *N. L. R. B.* v. *Syracuse Stamping Co.*, 208 F. 2d 77, 80 (C. A. 2); *N. L. R. B.* v *Pecheur Lozenge Co.*, 209 F. 2d 393, 402 (C. A. 2), certiorari denied, 347 U. S. 953; cf. *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 17, 34, n. 30.

their rights under Section 7, which includes the right to refrain from assisting a union. Manifestly when Dowdall paid money to the Union for a working card he was assisting it financially.[18] The remaining questions are whether he was "restrained or coerced" into such assistance, and whether he was an employee protected by Section 7 and 8 (b) (1) (A) when he made the payment.

That respondents "restrained or coerced" Dowdall into paying the permit fee appears from the fact that they made it a condition to his obtaining unemployment compensation. This was manifestly economic coercion of a real sort. See *N. L. R. B.* v. *Philadelphia Iron Works,* 211 F. 2d 937, 944 (C. A. 3), where the court, with ample citation of supporting authority, shows that coercion in the statutory sense is not limited to force and violence but embraces economic compulsion.

We think it equally clear that Dowdall was an "employee" protected by Section 7 and 8 (b) (1) (A) from being coerced into assisting the Union. It it true that Dowdall was not at the time employed by any particular employer. Nevertheless, at least *vis-a-vis* the Union, Dowdall was embraced within the statutory concept of "employee"—*i. e.,* he was a member of the class seeking employment. See *Phelps-Dodge Corp.* v. *N. L. R. B.,* 313 U. S. 177, 191–192. Contrary to the suggestion in the dissenting opinion

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[18] See *N. L. R. B.* v. *Eclipse Lumber Co.*, 199 F. 2d 684, 686–687 (C. A. 9); *N. L. R. B.* v. *I. A. M., Local 504*, 203 F. 2d 173, 176–177 (C. A. 9); *N. L. R. B.* v. *Murphy's Motor Freight, Inc.*, 231 F. 2d 654 (C. A. 3), enforcing 113 N. L. R. B. 524.

(R. 311–313), nothing in the statute or in decisions construing it limits the impact of Section 8 (b) (1) (A) to threats "to deprive [employees] of a term or condition of employment." Indeed, such a construction would reduce Section 8 (b) (1) (A) to a mere corollary of Section 8 (b) (2), which deals with threats to the employment relationship.[19]

It should be noted, moreover, that Dowdall's claim for unemployment compensation arose directly out of his employee status and hence was in fact a term or condition of his prior employment. The statutory protection for employees extends to applicants for compensation due them as former employees just as it extends to applicants who are potential employees. Cf. *Phelps-Dodge, supra,* 313 U. S. at 191–192.

Furthermore, Local 1046 and the San Bernardino and Riverside District Council coerced Dowdall in the exercise of his right not to join Local 1046. Because of the Unions' policy of requiring nonmembers to procure District Council permits for a fee before they can register on the Local's "Out-of-Work" list, Dowdall was faced with the choice of transferring his membership to Local 1046 or submitting to the permit fee requirement in order to qualify for his unemploy-

[19] In the cases relied on by the dissenting Board member (R. 312, n. 12), the economic coercion which the union was able lawfully to visit upon an employee was an incident to his loss of union membership. Under the proviso to Section 8 (b) (1) (A) a union can withhold membership from an employee who declines to assist it, and the economic coercion inherent in the Union's conduct is protected by the proviso. But when the Union denies, not *membership* but some other economic benefit, it has left the area protected by the proviso and has invaded the employee's right to refrain from assistance to a union.

ment insurance. He could refuse to accede only at the risk of forfeiting his unemployment insurance. Dowdall chose to pay the $5.00 permit fee which, under these circumstances, was a tax in addition to his regular monthly dues as a member of the Alaska local, and, as the Board found, was "in effect a penalty for membership in a sister local of 1046 rather than in 1046" (R. 304). That this constituted coercion within the meaning of Section 8 (b) (1) (A) of the Act cannot be gainsaid.[20]

III

The Board's order is valid and proper

To remedy the unfair labor practices, the Board ordered respondents, in the usual manner, to cease and desist from the discriminations found and to post the usual notices. In addition, the Board ordered respondents to refund the permit fees paid by Dowdall and Dockery. And, finally, the Board ordered the District Councils to publish appropriate notices in local newspapers of general circulation. We submit that these requirements are properly "adapted to the situation which calls for redress" and are reasonable

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[20] The proviso to Section 8 (b) (1) (A) of the Act, stating that the proscriptions of that Section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein," is inapplicable here for, as the Board states, "it is clear that the $5.00 fee was exacted from Dowdall, not as a condition of acquiring or retaining membership in Local 1046, but merely as a condition of registering for unemployment compensation." (R. 304). See *N. L. R. B.* v. *Philadelphia Iron Works*, 211 F. 2d 937, 940–941 (C. A. 3); *N. L. R. B.* v. *George D. Auchter Co.*, 209 F. 2d 273, 276–277 (C. A. 5).

means of effectuating the policies of the Act. *N. L. R. B.* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 348.

There can be no serious question as to the Board's power to direct a refund of the fees which Dowdall and Dockery were here required to pay the District Councils in order to make use of the Locals' hiring halls and obtain employment. See *N. L. R. B.* v. *Local 404, Int'l Brotherhood of Teamsters*, 205 F. 2d 99, 101–104 (C. A. 1).[21] Here, as in *Local 404*, the direct consequence of respondents' violations of Section 8 (b) (2) of the Act was to leave Dowdall and Dockery with no alternative but to pay these sums, for unless they paid, they could not obtain listings on the "Out-of-Work" registers and could not work for an AGC or BCA member. Nor could they secure such permits without the monthly payments to the District Councils. Accordingly, as decisions of this Court and others make clear, since respondents' unfair labor practices have resulted in exacting such payments from employees as the price for their employment, an order "restoring * * * what would not have been taken from them if the [Act]had not [been] contravened" is both proper and necessary to "expunge the effects of the unfair labor practices" and "fully effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *N. L. R. B.*, 319 U. S. 533, 541, 543–544.[22]

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[21] As we have demonstrated *supra*, pp. 18, 20, n. 14, 15, these fees did not accrue to the locals as a reasonable charge for operating the dispatch systems. Cf. *N. L. R. B.* v. *Local 12 supra* at p. 674.

[22] Settled law establishes that a reimbursement order constitutes reasonable exercise of the Board's broad power to remedy either union or employer unfair labor practices. See, with respect to

It is equally clear that, in the circumstances of this case, the mere posting of notices would be inadequate to bring home to all those who have been affected explicit assurance for the future that the respondents will refrain from their past unlawful practices of requiring permit fees from those employees who are not members of locals affiliated with one of the respondent District Councils. In all likelihood notices posted solely at the union halls would never be seen by nonmembers in the area who have been in the past either denied entry to the industry or subjected to the operation of the permit system. The Board by requiring, as it has elsewhere with judicial approval,[23] that the appropriate notice be published in a local newspaper of general circulation, which is likely to reach all employees in the area to whom the notice is addressed, has "suited" the remedy to the "practical needs" here evidenced (*N. L. R. B.* v. *Seven-Up Bottling Co.,* 344 U. S. 344, 351–352). This accords with the Board's long established policy of varying notice requirements so as to ensure

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the union dues paid under an invalid union security agreement—*Local 404 supra;* dues paid an employer-supported or dominated union—*Virginia Electric & Power Co.* v. *N. L. R. B., supra,* affirming 132 F. 2d 390, 396–398 (C. A. 4); *N. L. R. B.* v. *Spiewak,* 179 F. 2d 695, 697–698 (C. A. 3); *N. L. R. B.* v. *Baltimore Transit Co.,* 140 F. 2d 51, 57–58 (C. A. 4), certiorari denied 321 U. S. 795; *N. L. R. B.* v. *Parker Bros. & Co.,* 209 F. 2d 278, 279–280 (C. A. 5); excessive payments made to retain good standing in a union—*N. L. R. B.* v. *Eclipse Lumber Co., Inc.,* 199 F. 2d 684, 686–687 (C. A. 9).

[23] *N. L. R. B.* v. *Salant & Salant, Inc.,* 183 F. 2d 462 (C. A. 6), enforcing 66 N. L. R. B. 24, 114–116; *N. L. R. B.* v. *Local 420,* 39 L. R. R. M. 2173 (C. A. 3) December 11, 1956, enforcing 111 N. L. R. B. 1126, 1128.

in each case sufficient publication to "dissipate the unwholesome effect of violations of the Act" (*N. L. R. B.* v. *Frank Bros. Co., Inc.,* 321 U. S. 702 104). *N. L. R. B.* v. *Phillips Gas & Oil Co.,* 141 F. 2d 304, 306 (C. A. 3); *N. L. R. B.* v. *Sunbeam Electric Mfg. Co.,* 133 F. 2d 856, 861 (C. A. 7); N. L. R. B. *Sixteenth Annual Report* (Gov't Print. Off., 1952), pp. 239, 240–245; N. L. R. B. *Twelfth Annual Report* (Gov't Print. Off., 1948), p. 40.[24]

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[24] Where "the circumstances of the case are such" that posting of notices by employers or unions at their place of business alone would afford "insufficient notification to the employees" to effectuate the policies of the Act (N. L. R. B. *Eleventh Annual Report* (Gov't Print. Off., 1947), p. 49), the Board, in addition to issuing orders identical with that here (see n. 23, *supra*), has required (1) mailing of notices to employees individually (*N. L. R. B.* v. *American Laundry Machinery Co.*, 152 F. 2d 400, 401 (C. A. 2); *N. L. R. B.* v. *Gibson County Electric Membership Corp.*, 177 F. 2d 203 (C. A. 6), enforcing 74 N. L. R. B. 1414, 1421; *Shartle Bros. Machine Co.*, 60 N. L. R. B. 533, 535–536); (2) publication in an official union newspaper of notices addressed to union members (*ANPA v. N. L. R. B.*, 193 F. 2d 782, 806 (C. A. 7), enforcing 86 N. L. R. B. 951, 963 and 86 N. L. R. B. 1041, 1049, certiorari denied as to this aspect, 344 U. S. 812); (3) publication of notices in the plant newspaper (*Tomlinson of High Point, Inc.*, 74 N. L. R. B. 681, 691; *Meier & Frank Co., Inc.*, 89 N. L. R. B. 1016, 1021); and (4) supplying of employer notices to a union for posting in places accessible to striking employees (*American Newspapers, Inc.*, 22 N. L. R. B. 899, 937).

CONCLUSION

For the foregoing reasons we respectfully submit that a decree should issue enforcing the Board's order in full.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

DEFINITIONS

* * * * *

SEC. 2. When used in this Act—

* * * * *

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice. * * *

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

SEC. 10. * * *

* * * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be

served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * *. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon * * *.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appro-

priate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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